

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218074.2 DATE: October 24, 1985
MATTER OF: The Analytic Sciences Corp.

DIGEST:

Protest of an agency's decision to exclude the protester from the competition due to an organizational conflict of interest is denied where the agency reasonably canceled the initial solicitation, and notwithstanding the determination that the protester was ineligible to compete, received and evaluated the protester's proposal submitted under the resolicitation and the results of the evaluation show that the protester would not be entitled to award even if the protest of the conflict of interest determination were sustained.

The Analytic Sciences Corp. (TASC) protests its exclusion from competition by the Air Force under solicitation Nos. F34601-84-R-47065 (RFP 47065) and F34601-84-R-0131 (RFP 0131) because of an organizational conflict of interest. This protest follows an earlier one filed in our Office in connection with the same procurement. See The Analytic Sciences Corp., B-218074, Apr. 23, 1985, 85-1 CPD ¶ 464. The earlier protest was sustained and referred back to the Air Force with the recommendation to reexamine the decision to exclude TASC from competition. TASC now protests that the Air Force acted unreasonably and arbitrarily when it confirmed its decision to exclude the protester upon reexamination.

For the reasons set forth below, we deny the protest.

Background

In 1983, TASC submitted several unsolicited written proposals to the Air Force, setting forth TASC's concept of a logistics and technical support center (Center) to be developed for Tinker Air Force Base, Oklahoma, to provide technical support for the B-1B bomber fleet. TASC's idea was to provide new and advanced data processing, image

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processing, artificial intelligence, communications and other technical expertise to support all phases of B-1B support, including maintenance, troubleshooting, repair and supply. TASC reports that as a result of its initiative, the Air Force defined a three-phase acquisition plan consisting of (1) requirements analysis and the preparation of specifications, (2) the installation of a prototype Center and development of the Center's capabilities, and (3) the creation of the fully operational Center.

The first phase of the acquisition involved the analysis of the requirements for the Center and the preparation of the work statement to be used in the solicitation for the second phase. In October 1983, the Air Force issued solicitation No. F34601-84-R-47050 (RFP 47050) to cover this first phase. TASC was the successful offeror under the RFP, and was awarded the contract.

After TASC had successfully completed the initial contract, the Air Force issued RFP 47065 to cover the second phase of the Center's development. TASC was not solicited under RFP 47065 because the Air Force had decided that TASC's participation under the first phase rendered the firm ineligible to compete under the follow-on procurement based on organizational conflict of interest regulations. Federal Acquisition Regulation, (FAR) 48 C.F.R. § 9.505-2(b)(1) (1984). TASC protested the Air Force's decision that TASC was ineligible to compete under RFP 47065.

During the pendency of the initial protest, the Air Force canceled RFP 47065 for lack of qualified offerors and resolicited the requirement under RFP 0131.^{1/} This replacement RFP specifically excluded TASC as an offeror.

We sustained the initial protest because the record before us did not clearly show that the Air Force's actions were justified. The agency's decision to exclude TASC was based on FAR, § 9.505-2(p)(1), which states:

^{1/} Although TASC was not solicited under RFP 47065, it nonetheless submitted a proposal that was evaluated and found acceptable. The only other offeror was deemed technically unacceptable. Air Force Headquarters directed the contracting officer to review the solicitation for any restrictive aspects, expand the source list, and resolicit the requirement with a provision to specifically exclude TASC from the competition.

"If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services - or provides material leading directly, predictably and without delay to such work statement - that contractor may not supply the system, major components of the system, or the services. . . ."

An exception is provided in FAR § 9.505-2(b)(1)(ii) if the contractor "has participated in the development and design work." Although the Air Force had argued that the exception did not apply here, since the agency did not consider the first-phase contract to represent a development and design effort, we questioned this conclusion. We also expressed concern that the record did not clearly demonstrate that TASC's performance of the first-phase contract would now give the firm an unfair advantage in competing for the second-phase procurement. Because the responsibility for determining whether a firm has a conflict of interest rests with the procuring agency, see L.W. Planning Group, B-215539, Nov. 14, 1984, 84-2 CPD ¶ 531, we recommended that the Air Force reexamine its decision to exclude TASC. The Air Force reconsidered this determination, focusing on whether or not the work done by TASC under the Phase I contract was "development and design" work. The current protest is based on the agency's determination that the development and design exception does not apply, and its confirmation of its prior decision to exclude the protester from competing.

We view the issue, then, as whether TASC had the right to compete for the follow-on procurement and not whether it was entitled to an award as the sole offeror with an acceptable proposal under RFP 47065.^{2/}

^{2/} A contracting officer's determination to cancel a negotiated procurement need only be supported by a reasonable basis. Allied Repair Service, Inc., B-207629, Dec. 16, 1982, 82-2 CPD ¶ 541. Moreover, where an agency originally states one reason for a cancellation and its review after a protest reveals additional deficiencies that support the cancellation, these further justifications may also be considered. See 58 Comp. Gen. 451 (1979), 79-1 CPD ¶ 301. (con't)

Analysis

As in RFP 47065, TASC submitted a proposal under RFP 0131, despite its specific exclusion from the competition. Again, the TASC proposal was evaluated notwithstanding TASC's ostensible ineligibility to receive an award. The result of the evaluation under RFP 0131 leads us to the conclusion that the issue of TASC's eligibility is academic, because even if we were to agree with TASC on that issue, TASC would not be entitled to the award under the evaluation provisions contained in the solicitation. Moreover, our review of the record indicates that the evaluation was reasonable.

The solicitation contained specific criteria for the evaluation of technical proposals, a formula for the award of a point score for price, and a statement that the contract award will be made to the offeror with the highest total (technical and price) score. TASC was awarded the highest point score for technical merit among the competitors. However, its combined technical and price score, as determined by use of the formula, was not the highest and hence, it would not be entitled to the award, even if we were to resolve the organizational conflict of interest issue in its favor.

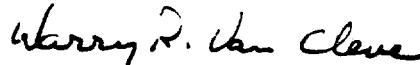
Further, TASC would not benefit by the discretionary rule announced in Harrison Systems Ltd., 63 Comp. Gen. 380 (1984), 84-1 CPD ¶ 572. Harrison held, inter alia, that a source selection official retains the discretion to examine the technical point scores to determine if there is any actual significant difference in technical merit, and, if none is perceived, that award could be made to the offeror with the lowest priced proposal even if its total point score is lower. The opposite result obtains in this case because the TASC proposal was the highest ranked

2/(con't) Here, the cancellation of RFP 47065 and resolicitation--based on the agency's determination that the sole technically qualified offeror was ineligible to compete--could be justified on the basis of the agency's interest in increasing competition. Since there are reasons supporting the cancellation beyond those which are being protested, the protester's claim to the award under the canceled RFP is a moot point. The cancellation would not be vitiated by a finding that TASC had been improperly excluded, since the agency would be justified in finding that a sole qualified offeror represents insufficient competition.

technically (about 2 percent higher than the offeror with the highest total score), but it was also significantly higher priced than the offeror with the highest total score.

The protester requests reimbursement of the costs of filing and pursuing its protests, including attorney's fees, and its proposal preparation costs under both RFPs. Our Bid Protest Regulations provide that the recovery of such costs may be allowed where our Office determines that a solicitation, proposed award, or award does not comply with statute or regulation. See 4 C.F.R. § 21.6(d) (1985). Since no finding has been made that the solicitations or the proposed award are inconsistent with statute or regulation, there is no basis for recovery of the claimed costs. Accordingly, TASC's request for reimbursement of its costs is denied.

The protest is denied.



Harry R. Van Cleve
General Counsel